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In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 78-1654

PETER BRANTI, As Public Defender
of Rockland County

Petitioner

vs.

AARON FINKEL and ALAN TABAKMAN,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

MARC L. PARRIS
County Attorney
Rockland County, New York
11 New Hempstead Road
New City, New York 10956
(914) 425-5180

CHARLES APOTHEKER, ESQ.
11 New Hempstead Road
New City, New York 10956
Of Counsel

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BRIEF OF PETITIONER

OPINIONS BELOW

The memorandum and judgment of the Second Circuit Court of Appeals dated February 20, 1979, which judgment is sought to be reversed, is not officially reported and is printed in the Appendix to the Petition for Certiorari at pages 1A - 4A. The opinion of the United States District Court for the Southern District of New York also reprinted in the Appendix to the Petition for Certiorari at pages 5A - 32A is reported in 457 F. Supp. 1284.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). The Judgment of the Court of Appeals was entered on March 19, 1979. The Petition for Certiorari was filed on April 30, 1979 and was granted by this Court on June 25, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. 1983, which are set forth in the Appendix to the Petition for Certiorari at page 33a.

QUESTIONS PRESENTED

1. Whether the Circuit and District Courts' holdings have extended and/or misinterpreted *Elrod v. Burns* by equating mere sponsorship with political coercion and by including attorneys employed part-time as Assistant Public Defenders within a class of non-policymaking, non-confidential employees, such as clerks, sheriff's deputies and janitors. The affirmance of the Trial Court's judgment virtually eliminates political appointments in Federal, State and Local Governments.

2. Whether the District Court's holding was clearly erroneous in that Petitioner did present a legitimate, same decision anyway defense and Respondents did not meet their burden under *Mount Healthy City Board of Education v. Doyle*.

3. Whether the ruling in *Ramey v. Harber* by the 4th Circuit Court of Appeals as to the applicability of *Elrod v. Burns* is correct and should be followed in the case at bar.

STATEMENT OF THE CASE

On January 4, 1978, Respondents (hereafter referred to as Messrs. Finkel and Tabakman) brought suit in the District Court for the Southern District of New York against Peter Branti, as Public Defender of the County of Rockland, New York and members of the County Legislature alleging that they were threatened with the termination of their positions as Assistant Public Defenders solely because of their affiliation with the Republican Party. (The case against all defendants except Mr. Branti was dismissed prior to the plenary trial.) The Respondents claimed that they were neither policymaking nor confidential employees and that they were satisfactorily performing their duties. They sought injunctive relief upon the claim that the threatened action violated their First and Fourteenth Amendment rights to freedom of political association and belief.

The Respondents, Aaron Finkel and Alan Tabakman, as Assistant Public Defenders, were appointed in 1971 and 1975, respectively. Assistant Public Defenders hold part-time positions in Rockland County, permitting their private practice of law. Respondents were in the exempt class of Civil Service serving at the pleasure of the Public Defender. The former Public Defender, Frank Barone, had a term of office which ended December 31, 1977, and his termination ended the employment of all his assistants. In the past, the terms of all Assistant Public Defenders ended with the term of the Public Defender. A new Public Defender would then make appointments to fill such positions in accordance with New York Law.

Upon his appointment as Public Defender, Mr. Branti appointed his assistants. All of the assistants appointed by Mr. Branti were registered Democrats, except one individual, who had no party affiliation. Mr. Branti did *not* reappoint two registered *Democrats*.

Respondents and their witnesses described Respondents' job performance as satisfactory with no policymaking or confidential function. Respondents maintainted that their failure to obtain the sponsorship of a member of the Democratic Caucus was the sole reason they were not reappointed. Respondents both admitted that no one conditioned their reappointment on Respondents' willingness to change their party registration, contribute money to the Democratic Party or support the Democratic Party in any way.

Petitioner and his witnesses maintained that although the Democratic Caucus could and did submit recommendations to the Petitioner for his consideration, the Petitioner had the right to refuse those recommendations and ultimately, his choice was final. No one conditioned Petitioner's appointment as Public Defender upon an agreement to hire or fire anyone. Petitioner described Respondents as "competent attorneys" but based upon Petitioner's experience as a former Assistant District Attorney, Respondents were not *competent Assistant Public Defenders* for a variety of reasons described in depth in the record. Petitioner felt that since his assistants are an extension of the Public Defender in each of the courts they appear in, they must, of necessity, enjoy a confidential relationship with him.

James Anderson, the County Personnel Officer, testified that Assistant Public Defenders are in the "exempt" class meaning that these persons carry out "major functions of the principal as though the principal were present" or that they served in a confidential capacity. Of the approximately 2000 County government employees, *less than* 50 served in the "exempt" class which included all of the Assistant Public Defenders, Assistant District Attorneys and some of the Assistant County Attorneys. These were considered "Confidential" positions.

After a non-jury trial, District Court Judge Vincent L. Broderick on September 29, 1978, issued his decision permanently enjoining the Petitioner, Branti, from terminating the employment of Messrs. Finkel and Tabakman as Assistant Public Defenders on the sole ground of their political beliefs.

On October 10, 1978, Judge Broderick signed final judgment in this case. On February 20, 1979, the Circuit Court of Appeals unanimously affirmed Judge Broderick's decision.

SUMMARY OF ARGUMENT

1. The prime issue in this case is whether mere sponsorship unaccompanied by other coercive acts as outlined in *Elrod v.Burns* offends the Constitution of the United States. Respondents argue that they were required to obtain the sponsorship of a Democratic Legislator in order to be retained as employees of the Public Defender. Petitioner argues that the Constitution is not breached by Democratic sponsored attorneys replacing Republicans as long as the Republicans were not coerced into providing support in some acceptable manner for the favored party. There is no allegation by the Respondents in this case that they were ever coerced or required to exchange anything in return for their jobs. Petitioner argues that mere sponsorship is not in and of itself unconstitutional and requires no compelling state interest in order to make it permissible. However, Petitioner argues that there may very well be a compelling state interest in a) providing attorneys with an entry into the political system; b) giving these attorneys relevant governmental training and experience; and c) providing political parties with a method or recruitment and training future elective office holders. The affirmance of the lower Courts' rulings will provide an entry barrier to these attorneys, stifle affirmative action in governmental employment and lead to the end of all constitutionally permissible patronage practices.

2. Attorneys, generally, and Respondents, Assistant Public Defenders are confidential, policymaking employees. Attorneys fall into a special class and usually have wide discretion in their duties. Attorneys should not be placed in the same class of employees who have little or no discretion such as janitors, deputy sheriffs, and clerks. The duties of a Public Defender and his Assistants are one and the same.

3. Petitioner argues that the lower Courts' decisions are clearly erroneous in that *Mount Healthy City Board of Education v. Doyle* mandates that the Respondents must meet their burden of showing that their constitutionally protected conduct played a substantial role in their non-reappointment. We believe the Respondents did not meet this burden at trial. However, the Petitioner did meet his burden in showing that he would not, under any circumstances, have reappointed these Respondents ("same decision anyway"). Petitioner also argues that the District Courts' rejection of the testimony of the Personnel Officer of Rockland County that the positions of Assistant Public Defender are confidential in nature, was also clearly erroneous and that the rejection of Petitioner Branti's testimony was arbitrary and without foundation.

4. Petitioner further argues that the recent decision of the 4th Circuit in *Ramey v. Harber* and its analysis of the plurality opinion in *Elrod v. Burns* is a correct one and has similar application to the case at bar.

POINT I
THE DECISION BELOW, BY EQUATING MERE SPONSORSHIP WITH POLITICAL COERCION EXTENDS THIS COURT'S DECISION IN ELROD v. BURNS, AND IN EFFECT ELIMINATES VIRTUALLY ALL FORMS OF CONSTITUTIONALLY PERMISSIBLE POLITICAL PATRONAGE

Petitioner has maintained throughout this case that what happened in Rockland County in the Fall-Winter of 1977-1978 is entirely distinguishable from the facts in *Elrod v. Burns*,[1] and calls for a different conclusion.

In *Elrod v. Burns*, supra, approximately fifty percent of the entire Sheriff's Department of Cook County was placed in a non-civil service category.[2] There was a history of a newly elected party discharging the political opposition from their jobs.[3] There was a factual finding that the Sheriff's employees in *Elrod* were threatened with discharge because of their failure to either pledge their allegiance to the Democratic Party, contribute money to the Democratic Party, work for the election of other candidates of the Democratic Party, or obtain the sponsorship of a member of the Party, *usually* at the price of one of the first three alternatives.[4]

Comparing those facts with the facts in this case we find an entirely different set of circumstances. In Rockland County's Public Defender's Office, the Assistant Public Defenders serve at the pleasure of the Public Defender and their offices become vacant when a new Public Defender is appointed (A. 138). Thus the

1 427 U.S. 347
2 Id. at p. 377
3 Id. at p. 351
4 Id. at p. 355

Respondents were not discharged, but simply not rehired by a new Public Defender.[5]

In Rockland County only 50 of the 2,000 Rockland County employees are in the exempt class. Out of these 50 employees, attorneys total 34 (A. 135-137). The balance of all other County employees are within the civil service merit system. Thus the merit system is the principal criteria for public employment in Rockland County Government.

Historically Rockland County has not followed wholly partisan considerations in staffing either the Public Defender's Office or the County generally. For example, when Arnold Becker, a Democrat, was Public Defender, he hired Republicans such as Respondent Finkel (A. 47). When Frank Barone, a Republican, was the Public Defender he hired Democrats (A. 47). The new Public Defender, Petitioner, Branti, chose not to retain Republicans *and Democrats* (A. 162).

The Democratic Majority in the Rockland County Legislature since 1974 has appointed various Republicans and persons with no political registration to various policymaking and exempt positions; (A. 296-304). Therefore, Rockland County does not practice nefarious party politics.

Respondents allege that they were not continued in office because of their failure to obtain a sponsor. Although Petitioner does not admit that there was a requirement of sponsorship in order to be appointed or reappointed to the Public Defender's Office, however, to squarely present the issue Petitioner will for the

5 They had no reasonable expectation of being retained as was the case in *Perry v. Sindermann, 408 U.S. 593.*

purposes of this appeal assume but not concede the factual findings of the District Judge that one needed sponsorship in order to be appointed to the Public Defender's Office.

Dealing with the issue of sponsorship, a significant difference with *Elrod v. Burns*, supra, appears. Sponsorship in *Elrod* was tied to and coupled with political coercion and did not involve a political party or individual making recommendations of prospective employees to the department head. The testimony in this case demonstrates that the Respondents were never coerced to do anything in exchange for their retention. Therefore, we are dealing herein, only with sponsorship without any coercion. When the political leaders decided to appoint Mr. Branti as the Public Defender, they did so with the clear understanding that Mr. Branti could and would have the *final* say as to who he would employ as his Assistants (A. 148). Mr. Branti knew that he was appointed by the political majority of the Rockland County Legislature. The Rockland County Legislature has the power of the purse over the Public Defender's Office.[6] While *Gideon v. Wainwright*[7] and the New York State statutes that followed mandated that localities must provide for the criminal defense of the poor, they do not dictate how many individuals are to be employed in the Defender's Office and how high the appropriation for such Office is required in any particular year. The political majority of the legislative body determines whether a Public Defender's Office will have one assistant, three assistants or twenty assistants. The political majority determines whether these assistants will be able to attend schools and conferences to better assist them in the criminal

6 This is no different than the various Congressional, Senatorial and State Legislature Appropriation Committees.

7 372 U.S. 589.

defense of the poor. Branti knew that continued support of the political majority was essential to maintain the integrity and the proper functioning of his office. Thus, he chose to consider the majority's recommendations and to appoint them *unless* they were not qualified.

Rockland County is geographically one of the smallest counties in New York State and Mr. Branti knew professionally almost every attorney specializing in criminal law in Rockland County (A. 148). In addition, he experienced social contacts at political gatherings with most of the Democratic attorneys of the County. Thus, Mr. Branti was well acquainted with the attorneys recommended to him; they were not strangers but rather friends. The attorneys recommended by the political majority were highly qualified for the positions of Assistant Public Defender. Some of them, the testimony shows, were attorneys whom Mr. Branti intended to appoint regardless of any recommendation (A. 148-149). They were respected colleagues and/or personal friends of Mr. Branti, and persons Mr. Branti trusted, respected, and wanted in his office. Fortunately, they were recommended to him by the political majority as well.[8] Is this any different than an executive in a large private corporation taking some of his former staff and/or hiring new staff when he moves to a new executive position.?

Judge Broderick found that the Petitioner had, at most, a veto power over the individuals recommended to him.[9] Obviously that veto power was a significant limitation on the Political Party's will in that if Mr. Branti did not believe that an individual recommended to him

8 See testimony (at A. 307-308) of Legislative Chairman Colman as to why one was recommended if Petitioner would appoint anyway.

9 457 F. Supp. 1284, 1287-1288

was qualified, Mr. Branti could veto that individual and request additional recommendations. Mr. Branti could have continued to veto the persons recommended to him until he obtained a name that was suitable to him. The actual fact in this case was that the names submitted to Mr. Branti were qualified attorneys and in his judgement there was no need for the exercise of his veto power. However, the power to veto was his and that veto power is a distinct difference from the facts in *Elrod*.

Does mere sponsorship so violate the Constitution as to require a compelling state interest in order to be permissible?

A sponsor is defined 10 as someone who accepts responsibility for someone else or who assumes or to whom is delegated responsibility for some other person or thing. Sponsorship and a democratic political system are inseparable. In seeking elective public office or appointive public office, one must seek the help or sponsorship of other individuals or groups of individuals. The Court may take Judicial Notice of that fact of political life. For example, sponsorship is the method by which Federal Judges are appointed. A prospective Federal Judge is sponsored by a United States Senator in order to be appointed by the President of the United States. Occasionally, as in the present case of Archibald Cox, sponsorship by a certain Senator may be the reason the President fails to appoint that individual, thus a political consideration. Judge Jon Newman was recently appointed to the Second Circuit through the sponsorship of Senator Abraham Ribicoff of Connecticut. Judge Newman, although highly qualified, was characterized as Senator Ribicoff's protege'. Does this type of

10 Websters New International Dictionary, Second Edition.

sponsorship offend the Constitution? [11] Is a compelling state interest required to justify this type of sponsorship? Petitioner argues that sponsorship absent coercion, does not need the excuse of a compelling state interest in order to be constitutional; in short, there is nothing wrong with sponsorship. Sponsorship and politics exist in practically every selection process.

Can this Court effectively eliminate politics and sponsorship from any selection process? [12] Whenever one requires the support of a group of individuals, there is a political consideration. This Court should not totally eliminate that kind of consideration in appointment to governmental jobs of a professional nature. Mere sponsorship, whether it be for the position of Federal Judge or Assistant Public Defender does not offend the Constitution and does not require a compelling state interest in order to be permissable.

For almost every position in appointive public office there are a number of highly qualified applicants, some of whom will be selected and others who will not be selected. It is not constitutionally repugnant to be appointed through the efforts of a political party as long as no coercion attaches to that sponsorship which

11 See *Newsweek*, February 12, 1979, "*Judges: on the merits?*" in which former Attorney General Bell describing his appointment to the Federal Bench in 1961 was quoted "I wasn't merit selected. I knew two Senators and one President, so I was appointed."
See also, the recent study of *American Judicature Society* quoted in *New York Law Journal* August 14, 1979 which study maintains that political considerations still are a major factor in appointments to the Federal Bench.

12 See *Newsweek*, October 30, 1978, "*Pope From Poland*" which leads one to the conclusion that there is politics and sponsorship in religion, private industry and social clubs as well as government.

detrimentally affects the political beliefs of employees who are not reappointed to the office. In other words, the Constitution permits Democratic employees sponsored by their Party to replace Republican incumbents whose terms have expired as long as the Republicans were not coerced into changing their political beliefs in order to be retained.

Although Petitioner never sought to justify the non-retention of Respondents on the basis of compelling state interest, it is arguable that there is a compelling state interest in using appointive legal positions to recruit and train future candidates for elective public office.

The political system in Rockland County whereby people are recommended to a department head for his review and appointment is either a justifiable intrusion or no intrusion at all on the constitutional rights of the Respondents.

Elected officals have the right and the responsibility to influence the selection of employees for positions of public trust. The performance of those employees will reflect either well or badly on the elected officals. There is an incentive to recommend the best available, qualified individuals so that the government will operate efficiently and the elected officals can be re-elected to public office.

Obtaining sponsorship or recommendations from elected officals provides those attorneys who work for party organizations the opportunity for governmental service and possibly, thereafter, their own candidacy for elective office. This stregthens party structure at no one's expense. Judge Broderick, in Footnote 13 of his Opinion, [13] seemed disturbed that

13 457 F. Supp at page 1293.

the Assistant Public Defender's political persuasion influenced whether he or she should be appointed to that position. Petitioner agrees that one's political affiliation does not make one an effective or non-effective Public Defender. (Certainly a person's views on the poor and underprivileged is a legitimate area of concern.) However, appointment to the position of Assistant Public Defender does furnish one with an entry into public service and therefore gives relevant governmental experience. It also can serve as a transitional phase from private practice into governmental service.

A major function of party organizations is the recruitment and training of future candidates for elective office and one way of accomplishing this objective is to recruit lawyers. If the political parties do not have the right to influence the selection of lawyers for appointive office, an *entry barrier* to public office is established and therefore, elective office will be only available to the very rich and powerful who can create their own opportunity for experience and training and finance their own campaigns.[14]

Party organizations accomplish the recruitment and training and provide relevant experience to future elective office seekers by recruiting people, including lawyers, to run for local elective office and particularly by recruiting lawyers to fill appointive positions, such as Assistant District Attorney, Assistant County Attorney and Assistant Public Defender. [15] Dan Nimmo and Thomas D. Ungs, in their treatise, *American Political Patterns: Conflict and Consensus, state:*

14 Schlesinger, Joseph A., *Ambition and Politics: Political Careers in the United States*, Rand McNally & Company (1966), p. 179.

15 Id., pp. 78-79, 87, 179-181.

> "The perfomance of American politicians depends upon more than their popular esteem and social backgrounds; it depends also on the ways in which they are selected for leadership from various segments of the community, introduced to political office, and trained in the appropriate governing skills. We call this process *political recruitment*. 16

And in his treatise *The Lawmakers: Recruitment and Adaption To Legislative Life*, James David Barber quotes V. O. Key, one of the foremost political scientists of the postwar era:

> "Perhaps the most important function that party leadership needs to perform is the development, grooming and promotion of candidates for statewide office. Although striking exceptions may be cited, it is in its inadequacy in this role that the most grave shortcoming of party leadership is to be found. To assert that party leadership of many states develops candidates is more an attribution of a duty stated in the textbooks than a description of real activity." 17

Professor Barber goes on to say,

> "Political leadership selection, then, should be viewed not only as the elimination of certain individuals but also as a process by which candidates are attracted to, recruited for, adapted to, and retained in public service." 18

16 Nimmo, Dan and Thomas D. Ungs, *American Political Patterns: Conflict and Consensus*, Little, Brown and Company (1969), p. 221.

17 Barber, James David, *The Lawmakers:Recruitment and Adaption to Legislative Life*, Yale University Press (1965), pp. 4-5.

18 Id., p. 5.

As previously stated, appointment to the positions of Assistant District Attorney, Assistant County Attorney and Assistant Public Defender, provides attorneys with entry into the politcal system, gives relevant governmental training and provides a recruitment process by the political parties for future elective office. The Court can take Judicial Notice that many attorneys prior to holding elective and/or judicial public office first held appointive public office. In the words of Woodrow Wilson, "The profession I chose was politics; the profession I entered was law. I entered one because I thought it would lead to the other." [19] Earl Warren, former Chief Justice of the United States Supreme Court, started his career as an Assistant District Attorney, probably with the sponsorship of a political party.

Petitioner argues that affirmance of the Lower Courts' ruling would establish an *entry-barrier* to attorneys entering governmental service and future political office, and this constitutes a compelling state interest and may be viewed as a justifiable intrusion or no intrusion at all on the Constitution. We don't believe this Court should create a barrier to entering governmental service and future elective office while at the same time providing part-time government attorneys who have full-time law practices and whose terms of office have expired with lifetime governmental jobs.

Petitioner argues that the decisions below may effectively eliminate a major part of affirmative action in the public sector. Minorities and women are graduating from our law schools in increasing numbers. These new attorneys, especially in the inner-cities, have access to the various political leaders in their communities to seek their assistance in obtaining exempt

19 Schlesinger, Id., p. 17.

governmental employment. If the decisions below are affirmed, that vehicle for the entry into governmental service for these individuals might be effectively blocked.

Petititioner also argues that the Respondents by their own acts have waived any right they may have had to object to their replacement. Not only did the Respondents first obtain their positions through the same political process that they now find inimical to their constitutional rights, but they also sought to retain their jobs through that same political process. [20] Both Respondents believed that in order to be reappointed they required the sponsorship of a Democratic Legislator. However, they were never asked by anyone to do anything in order to keep their jobs. No political leader or officeholder ever told Respondents that they would have to join the Democratic Party, contribute money to the Democratic Party or swear allegiance to the Democratic Party in order to be retained in their positions (A. 90-91, A. 112). The Respondents were *simply ignored*. They were not asked to provide support for the favored party in return for their re-employment. Where was the purposeful and intentional discrimination against these Respondents? Would the Respondents have complained if they had been retained in office others replaced? Do they complain that hundreds of other lawyers in Rockland County weren't considered and appointed to the positions they held? Were such other attorneys in Rockland County, who were ignored by the political process, victims of Constitutional deprivation? [21] We think not. If the gentle and moderate

20 *Nunnery v. Barber*, 503 F. 2d 1349 (Ca 4 1974); *American Federation of State Employees v. Shapp*, 443 Pa. 527, 280 A. 2d 375 (1971).

21 See 78 *Columbia Law Review* 468.

political patronage system followed in Rockland County violated the Constitutional rights of the Respondents, Petitioner argues that all forms of constitutionally permissable political patronage have been effectively eliminated.

POINT II
ATTORNEYS GENERALLY AND ASSISTANT PUBLIC DEFENDERS IN PARTICULAR BY THE NATURE OF THEIR DUTIES ARE POLICYMAKING AND CONFIDENTIAL EMPLOYEES

This Court on a number of occasions has described attorneys as being a special class of individuals. In *Bates v. The State Bar of Arizona*, it was stated,

> "We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present members of this Court, licensed attorneys all, could not feel otherwise . . ."[22]

> "Physicians and lawyers for example do not dispense standardized products. They render professional services of almost infinite variety and nature . . ."[23]

> "In most situations it is impossible both for the client and the lawyer to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine."[24]

> "Lawyers are not hermits and society would suffer if they were. Members of the legal profession customarily are leaders in the civic, charitable, cultural and political life of most communities. Indeed the professional

22 433 U.S. at 368.
23 433 U.S. at 365, Footnote 17.
24 433 U.S. at 392.

> responsibility of lawyers is thought to include the duty of civic and public participation. As a profession lawyers do differ from other callings. This is not a fancied conceit, but a cherished tradition, the preservation of which is essential to the lawyers reverence for his calling . . ."[25]

We argue that attorneys generally and Assistant Public Defenders specifically should not, under the doctrine in *Elrod v. Burns*, be placed in the same class as deputy sheriffs and janitors.

Even the holding of *Elrod v. Burns*, supra, permits a municipal employee, without civil service protection to be discharged by a new political administration solely for political reasons when the employee is either a policymaker or a confidential assistant.[26]

As was stated in a recent Harvard Law Review article:

> "No clear line can be drawn between policy-making and non-policymaking positions. Elevator operators and janitors clearly fall within the Court's proscription of patronage firings, and department heads clearly do not; the applicability of the Elrod decision to the broad range of jobs in between these extremes remains to be resolved on a case by case basis."[27]

Judge Broderick discusses the policymaking and confidential employee exemptions in his opinion [28] and concludes that Messrs. Finkel and Tabakman were in neither category. He believed these gentlemen did not have "broad-scoped duties" as did the discharged

25 433 U.S. at 401, Footnote 11.
26 427 U.S. at 367, 375.
27 90*Harvard Law Review*, 56, 194.
28 457 F. Supp. 1290-1292.

City Attorney who was held to be a policymaker in *Newcomb v. Brennan*.[29]

Petitioner contends that all public employment in the political subdivisions of the State of New York must be governed by the provisions of the State Constitution, Civil Service Law and the rules and regulations promulgated thereunder. (*Bishop v. Wood, 426 U.S. 341, 344; Board of Regents v. Roth*, 408 U.S. 564, 577; *Codd v. Velger*, 429 U.S. 624). James Anderson, the Rockland County Personnel Officer, testified as to the rationale for placing employees such as Assistant Public Defenders in the exempt class:

> ". . .Positions are placed in the exempt class because . . .of a policy determination, carrying out some of the major functions of the principal as though the principal were present, or a confidential relationship. All three or any one of those factors may be present in the determination of a position being placed in the exempt class." (A. 135)

Employees are classified by the Personnel Officer pursuant to Section 20 of the Civil Service Law subject to State Civil Service confirmation. The process that placed the Respondents into a class described by the County's Personnel Officer as confidential and "carrying out some of the major functions of the principal as though the principal were present" should have been enough evidence for the Trial Court to determine that Respondents were policymaking, confidential employees.

In a case decided in Suffolk County, New York, the Court rendered an opinion in a proceeding brought by a discharged Assistant District Attorney seeking

29 558 F. 2d 835 (7th Cir., 1977) cert. den. 434 U.S. 968.

reinstatement to his former position. [30] All of the Suffolk County Assistant District Attorneys were classified as exempt appointees as are the Assistant Public Defenders in the case at bar. In order to bring himself within the protection of the Civil Service Law, the discharged petitioner argued that "not only was he not a deputy, but also, by virtue of his assignment to the screening bureau at the time of his removal he was a subordinate or clerical employee . . . protected by Section 75 (subd. 1, par [b]) of the Civil Service Law" which would require charges and hearing prior to his dismissal. In discussing the issue as to whether the Petitioner was in fact a deputy of the District Attorney, the court said: (id.)

> "An appointee's status as a deputy is determined not by what the appointee in fact does but by what he is directed or authorized to do by the statute, i.e., whether there is a statute authorizing the principal officer to delegate his duties to the subordinate, (*Behringer v. Parisi*, 5 N.Y. 2d 147) . . ."[31]

The Court concluded that the discharged employee did not have a meritorious case and dismissed the petition. The mere fact that his assignment led him to characterize his position as that of a petty subordinate did not, ipso facto, make him one. The operation of the administrative function of the office could not convert the lawyers role as Assistant District Attorney into that of a subordinate office clerk.[32]

The duties of Assistant Public Defenders are markedly similar to those of Assistant District Attorneys

30 *Matter of Clarke v. O'Brien*, 91 Misc., 2d 190, 397 N.Y.S. 2d 509, Aff'd. 56 A.D. 2d 869, 392 N.Y.S. 2d 383 on the opinion below.

31 91 Misc. 2d at 192.

32 91 Misc. 2d at 193.

since they are counterparts (*Matter of Paroli v. Bolton*, 57 Misc. 2d 952, 955, rev on other grounds, 44 A.D. 2d 557, Aff'd. 35 N.Y., 2d 772). The assistant may be *administratively* assigned a subordinate role (as was the case in *Clarke*, supra) but he remains the delegate of the Public Defender since he performs the same duties charged by law to the Public Defender. Section 716 of the County Law authorizes the creation of the Office of the Public Defender by the local Board of Supervisors or Legislature and Section 717 of such law sets forth the duties of the Public Defender as follows:

> "Section 717. Public defender; duties 1. The public defender shall represent, without charge, at the request of the defendant, or by order of the court with the consent of the defendant, each indigent defendant who is charged with a crime as defined in section seven hundred twenty-two-a of the county law in the county or counties in which such public defender serves. When representing an indigent defendant, the public defender shall counsel and represent him at every stage of the proceedings following arrest, shall initiate such proceedings as in his judgment are necessary to protect the rights of the accused; and may, in his discretion, prosecute any appeal, if in his judgment the facts and circustances warrant such appeal."

The office of Public Defender, as a public office, operates upon two distinct and separate levels. One is administrative and the other, substantive. Judge Broderick held, in his Opinion, that Assistant Public Defenders have very limited, if any, responsibilities respecting the overall operation of that office. [33] By

33 457 F. Supp. at 1291.

that, we, assume he means the administrative level, since he recognizes that "with respect to particular cases that they handle, Plaintiffs (Respondents herein) have responsibilites that are not well defined and are of broad scope . . ."[34] The overall operation and function of the Public Defenders office is fixed by statute, directing the office to represent, counsel and defend indigents accused of crime. The statute in fact delegates one of the duties of the sovereign to the Public Defender, i.e. to provide defense services for the poor as it provides prosecutorial services for the State at large.

The Assistant Public Defender assigned to a case carries with him all of the powers and duties assigned by the statute to his principal. The substantive function of the office, the duty to defend, is what is delegated to that assistant. He stands in a court of law or in a jail cell counseling an inmate as the representative of the public which, by its state legislature, has determined that the poor shall have counsel and defense services.

The Trial Court also found that Respondents, as Assistant Public Defenders, did not "formulate plans for the implementation of the broad goals of the office."[35] The broad goal of the Public Defender's office must be that which the statute creating the office and defining its duties commands. Again, that goal is solely to represent and counsel poor persons accused of crime. Each and every Assistant Public Defender must do that at the very least.

The Assistant, as such, stand thus in a markedly different position from that of an ordinary office worker or clerical employee. He must have the entire confidence of his principal since he is charged with

34 Id.
35 Id.

carrying out the very same defense service duties as required of his principal. His conduct, his demeanor and his expertise are all reflections upon his principal. He must discuss the confidences of office clients with his principal as would any attorney employed in a private law office. In short, and excluding some administrative duties of the office, he stands in the same shoes as the Public Defender with reference to the goals and duties of the office.

One may well ask what constitutes policymaking in the Public Defenders office. The Public Defender has no say in determing the character of his clientele or his case load. He may not choose which cases he would prefer to handle. He takes on all who are eligible for his services as commanded by statute and in that respect he differs from the private lawyer who may refuse a retainer for any reason unless ordered by a court. Thus, policymaking cannot include an executive determination as to the case areas and clients the defender will undertake to represent.

In *Newcomb v. Brennan*, supra, and *Ramey v. Harber*[36] no mandates appear for reaching the conclusion that Messrs. Finkel and Tabakman were not policymakers. Since the broadest goals of the office are statutorily defined there is no reason for discussion of petty administrative niceties such as who shall be allowed vacation and when, which clerical worker may have the day off, and the like. Administrative policy of this kind may be made by the department head or delegated to his appointees. That surely cannot be what the *Elrod* plurality meant by "policymaking."

Each Assistant Public Defender is a policymaker in the substantive sense of his duties. A recent article in

36 589 F. 2d 753 (4th Cir. 1978, cert. den.).

the *Journal of the American Judicature Society* supports that assertion.[37]

The second exception carved out by the *Elrod* concurrence involves the consideration of confidentiality. Judge Broderick found that Messrs. Finkel and Tabakman were not confidential employees "in the required sense." [38]

He believed that one must be an advisor to the policymaker or stand in some related confidential status, as the two concepts are complementary.

For the purpose of argument, let us assume that Assistant Public Defenders are *not* policymakers and that only the department head or his chief assistant occupy policymaking posts and on this hypothetical consider the situation in Rockland County. The Public Defender must staff his office to man twenty-three Village and Town Justice or police courts and three County Courts (A. 57). He obviously cannot be in all of the functioning courts at the same time and must rely upon his Assistants to cover all of the cases for which he, the Public Defender, is responsible.

In order to keep himself informed of the workings of his office, the Public Defender must rely upon the advice and the information he receives from his Assistants. Since the exercise of defense responsibility involves more than mere ministerial data gathering, confidential information must pass between the assistant and his principal. The assistant may be responsible for several Justice Courts in which he operates. It is the assistant's responsibility and his duty to protect the rights of the Public Defender's clients by

37 62 Judicature 176 (No. 4 October 1978).
38 457 F. Supp. at 1291-1292

formulating workable plans and advising his principal to have them implemented. The cerebral function of analyzing the problem and advising as to solutions in the conduct of defense services resides with the particular assistant. His role is not that of a mere soldier or messenger (A. 94-104). He is the front line and the cutting edge of the Public Defender's statutory duty and he must therefore stand in a very close personal relationship with his principal.

If the principal does not trust his assistant, or lacks confidence in his dedication and ability, a very serious problem arises. Lack of a confidential relationship between assistant and principal will prevent the principal from carrying out his mandated duty. Thus the assistant must have the confidence of the Public Defender to enable the latter to formulate policy. This point is argued solely to demonstrate that a confidential relationship may exist even where the assistant does not have a specific "policymaking" function, but does not constitute a concession that Assistant Public Defenders are not policymakers in the substantive sense.

Petitioner submits that, in a real and practical sense, Assistant Public Defenders act as representatives of their principal; that the duties of the principal are delegated to all of his assistants; that they are policymakers in a statute-related substantive sense fitting within the definition of the term as illustrated by the *Elrod* plurality; that, at the very least, their positions make them confidential employees of necessity regardless of any determination of their policymaking status. Assistant Public Defenders are the alter egos of the Public Defender and must have his trust and confidence in order to properly perform their duties. Surely, Assistant Public Defenders, charged with the duty of the legal representation of the poor, do not fall

into the same category as janitors. Is not policymaking and confidentiality, in the broad sense, an intricate part of any practicing attorney's trade whether he is an Assistant United States Attorney, Assistant State Attorney, Assistant District Attorney, Assistant County Attorney or Assistant Public Defender? In fact, are not attorneys, by reason of their professional duties, in a continuing confidential relationship with both their employers as well as their clients? Petitioner therefore urges reversal upon these grounds as well.

POINT III
THE DISTRICT COURT'S HOLDING WAS CLEARLY ERRONEOUS - PETITIONER DID PRESENT A LEGITIMATE SAME DECISION ANYWAY DEFENSE IN ACCORDANCE WITH THE MOUNT HEALTHY DECISION OF THIS COURT

Petitioner argues that the Respondents failed to meet their burden of proof at trial pursuant to this Court's opinion in *Mount Healthy City Board of Education v. Doyle*.[39] However, Petitioner did meet his burden of going forward with evidence to show the non-political grounds for his decision not to reappoint Respondents. The Second Circuit rejected that argument on the grounds that since Judge Broderick found that the attempted termination was "solely" for political reasons, a finding not clearly erroneous, his decision was wholly consistent with Mounty Healthy (Appendix to Petition, 2a-3a). Petitioner respectfully disagrees with the Second Circuit's interpretation of Mount Healthy and its opinion that the District Court's findings were not clearly erroneous.

Elrod v. Burns, supra, makes it clear that employees must prove that their discharge was based solely upon partisan patronage grounds, that they were satisfactorily performing their jobs and that they were non-policymaking, non-confidential employees. Under the *Mount Healthy* case, the employee would have the initial burden of showing that his constitutionally protected conduct played a substantial role in his employer's decision not to rehire. The burden then would shift to the employer to show by a preponderance

39 429 U.S. 274 (1977).

of the evidence that he would have reached the same decision as to the employee's re-employment even in the absence of the protected conduct.

In the case at bar, the employees (Respondents) did present evidence attempting to show that they required a sponsor in order to be reappointed and that they were satisfactorily performing their jobs and that they were non-policymaking, non-confidential employees. The Petitioner, Branti, then presented evidence on his behalf to show that, even in the absence of political considerations, the Respondents, employees, would not have been re-employed. The District Court Judge, arbitrarily rejected Petitioner's testimony as *post hoc* and *ante litem motem*.[40]

The District Judge held that Mr. Branti decided not to re-appoint Messrs. Finkel and Tabakman solely on the ground of their political associations and beliefs, a clear First and Fourteenth Amendment protected area (*NAACP v. Button*, 371 U.S. 415; *Kusper v. Pontikes, 414 U.S. 51; Keyishian v. Board of Regents, 385 U.S. 589; Perry v. Sindermann*, 408 U.S. 593). That conclusion would be tenable if there were no otherwise valid reasons, substantial or otherwise, in Mr. Branti's mind prior to the time he made his decision not to reappoint them, but that conclusion is erroneous, mindful of the "clearly erroneous" standard applied by the Circuit Courts of Appeal (*Rivera Morales v. Benitez de Rexach*,[41] and *United States v. United States Gypsum* [42]). Mr. Branti testified to several substantial and non-political grounds for deciding not to re-appoint Messrs. Finkel and Tabakman, known to him prior to January, 1978. These reasons involved, a lack of confidence, an ethi-

40 457 F. Supp. at 1292.
41 541 F. 2d 882 (1st Cir.).
42 333 U.S. 364

cal conflict and a perceived disloyalty. They are fully articulated in the record and need not be reiterated here. (A. 366-376).

Moreover, Branti's testimony on the first day of the proceeding is not inconsistent with his statements made on the last day of the trial. On January 6, 1978 (which was the day set for hearing the motion for the preliminary injunction) Mr. Branti said that Messrs. Finkel and Tabakman were both competent attorneys, but that he was not impressed with either of them and would not have appointed them as Assistant Public Defenders in his office (A. 157-163). That position was consistent with testimony he gave on the last trial day (February 10, 1978) concerning Messrs. Tabakman and Finkel (A. 352-355; 366-369).

We submit that Mr. Branti's direct testimony, uncontraverted on cross examination and examination by the Trial Court, indicated that he would not have reappointed the complainants under any circumstances (A. 161-162).

We note what this court said in *Givhan v. Western Line Consolidated School District*,

> "We cannot agree with the Court of Appeals that the record in this case does not admit of the argument that petitioner would have been terminated regardless of her 'demands.' Even absent consideration of petitioner's private encounters with the principal, a decision to terminate based on the reasons detailed at nn1 and 2 ante, would hardly strike us as surprising . . ."[43]

In *Elrod*, the bottom line question was whether the complainants *stated* a federal cause of action. Alleging

43 -- U.S. -- 58 L. Ed. 2d at 626, Footnote 5.

that they were faced with coercive tactics affecting their basic right to free political association and belief, the burden remained with the complainants to demonstrate the truth of their claims at the trial yet to come.. Here, however, we are beyond the pleadings stage. Upon the record made in this case, none of the coercive tactics condemned in *Elrod* have been applied by Mr. Branti, or by anyone else, to either Mr. Finkel or Mr. Tabakman. Thus, the record is barren of the hard proof necessary for Respondents to sustain their initial burden, to prove that their political affiliation was the sole, or substantial, or motivating factor leading to their loss of public employment (A. 89-91; 112).

To fit within the penumbra of *Elrod* proscribed acts respecting the fate of Messrs. Finkel and Tabakman, Mr. Branti, or those political officials associated with him, would have to be shown as having *insisted* upon any or all of the following terms as conditions precedent to retaining them as Assistant Public Defenders:

1. They would have been *directed* to change their party affiliation;

2. They would have been *required* to return a portion of their public salaries to the Democratic Party Purse;

3. They would have been *required* to support the candidates seeking office on the Democratic ballot;

4. They would have been *directed* to do any of the above in exchange for the support of a Democratic County Legislator in their quest for re-appointment as Assistant Public Defenders.

None of these conditions were ever exacted from or required of either Mr. Finkel or Mr. Tabakman, nor does the record contain such evidence (A. 89-91; 112). The *Mount Healthy* standard was therefore not met by the Respondents here.

And nothing in the record suggests that Mr. Branti sought to advantage his party at the expense of Messrs. Finkel and Tabakman's right to freely associate with the Republican Party, to believe in its principles or support its platforms.

On January 6, 1978, Mr. Branti testified that no one in his party told him he would have to discharge Messrs. Finkel or Tabakman as a condition of his own appointment as Public Defender (A. 148, 162-163). He also said that he did not re-appoint Messrs. Leudan and Fitzgerald, who were registered Democrats, and that his decision in all cases was based upon his estimate of the competence and integrity of the candidates for his staff (A. 134, 141).

We think that a fair application of the *Mount Healthy* balancing standard must lead to a result opposite that reached by Judge Broderick. We believe that the defense met the standard announced in that case when the record is considered as a whole. There simply was no conspiratorial design to replace all Republicans with Democrats as Assistant Public Defenders. While Judge Broderick states in his opinion, [44] that Mr. Branti rated the complainants as "competent attorneys" he does not further point out, as appears in the record, that Mr. Branti was *not* referring to them as competent *Assistant Public Defenders* (A. 157-163). Petitioner contends that the Trial Judges' discounting of Mr. Branti's testimony on the last trial day was without foundation and that a review of the entire record demonstrates that Petitioner's testimony was rejected arbitrarily by the District Court. Petitioner also respectfully suggests an examination by this Court of the sealed portion of the record not admitted into evidence by the Trial Judge which relates to the credibility of Respondents'

44 457 F. Supp. at 1292.

witness Frank Barone, in whom the Trial Judge placed great reliance.

The power to make appointments to the position of Assistant Public Defender resides in the Public Defender, (N.Y. County Law, Sec 716 [McKinney]). Older New York decisions teach us what constitutes an appointment under the law.

> "(T)he choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that *while he or it may listen to the recommendation or advice of others*, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial (citing cases)" (*People ex rel. Balcom v. Mosher*, 163 N.Y. 32, 40). (emphasis supplied)

By Statute, then Mr. Branti possessed more than a simple veto power.

This Court can and should correct what the Petitioner claim to be error by the Court below in deciding that the law in *Elrod* covers the facts of this case. The *Elrod* holding should be limited to the coercive tactics reported in that case. The decision in *Mount Healthy City Board of Education v. Doyle*, supra, imposes a greater burden upon the respondents than was sustained in the Instant case. In any event, Mr. Branti met his burden of going forward with evidence demonstrating non-partisan and non-political grounds for deciding not to re-appoint Messrs. Finkel and Tabakman. In the absence of specific proof of coercive political tactics brought to bear against either gentleman such as would infringe upon their rights guaranteed by the First and Fourteenth Amendments or those protected by federal statute, the Respondents have failed to meet their initial burden.

POINT IV
THE RULING OF THE 4th CIRCUIT IN RAMEY V. HARBER, WHICH IS AT VARIANCE WITH THE RULINGS IN THIS CASE AS TO THE APPLICABILITY OF ELROD V. BURNS IS CORRECT AND SHOULD BE FOLLOWED IN THE CASE AT BAR

The 4th Circuit in *Ramey v. Harber*, supra, held that they would not apply *Elrod v. Burns*, supra, retroactively. However, in their opinion, the Court stated that Respondent, Harber, made a fairly persuasive argument that *Elrod v. Burns* had no application in their case upon the ground that the facts upon which the Supreme Court based its decision are materially different then those presented in *Ramey*. [45] The 4th Circuit stated that in *Elrod* the deputies who held indefinite terms of appointment were discharged or threatened with discharge solely because they did not support and were not members of the Democratic Party and failed to obtain the sponsorship of one of its leaders. The 4th Circuit found that the facts in the *Ramey* case were dissimilar in the way the Plaintiffs had been appointed, in that the statute appointing the *Ramey* deputy sheriffs contains the only authority for that appointment. [46] Under that statute, the terms of the deputies in Virginia end with the term of their principal. The Court continued that all of the Plaintiffs were familiar with that statute and knew that their appointments terminated with the expiration of Sheriff Flannery's term. [47] They were also aware of the practice which had prevailed for many decades in Lee County and the other small counties under which a change in the political party controlling the sheriff's office is generally followed by a

45 589 F. 2d at 756.
46 Id.
47 Id.

complete change in the deputy positions. [48] The Court stated that Sheriff Harber made no demand on the Plaintiffs that they change their political affiliations as a condition to reappointment. [49]

In the case at bar, the Personnel Officer of Rockland County testified that the terms of the Assistant Public Defenders, ended with the terms of their principal, the Public Defender (A. 138). The Respondents originally obtained their jobs through the same political process and sought to retain their jobs through that process.

In the *Ramey* case the Court noted the intimate relationship that exists between the Sheriff and his Deputies in a small County such as Lee County, Virginia. [50] Petitioner argues that there must be a feeling of confidence and trust between the Public Defender and his Assistants, especially in an Office that has one Public Defender and only nine Assistant Public Defenders.

The *Ramey* Circuit Court held that,

> "the concurrence of Justices Stewart and Blackmun, in the plurality opinion, explicitly limited the Court's holdings to patronage dismissals. As one commentator has observed, the narrow position of the concurrence must be taken as the holding of the court." [51]

In this case, as well as in *Ramey*, there was a non-reappointment at the end of a term. There was no discharge. Circuit Judge Hall in the *Ramey* decision, concurred and stated quite emphatically that *Elrod* had

48 Id.
49 Id.
50 Id at 751.
51 Id.

no application in that case because: 1) the deputies took office pursuant to a statute which fixed their terms; 2) they simply were not rehired after the terms expired; 3) the deputies were not pressured to contribute time or money to the new sheriff's party or to obtain the sponsorship of a member of that party, and; 4) mutual confidence and cooperation must exist in the Lee County Sheriff's Office.[52]

In this case, since the terms of office ended with the Principal, there was no firing but a non-rehiring; there was no pressure brought upon the Respondents to join the Democratic Party, contribute money to the Democratic Party, swear allegiance to the Democratic Party or even find a sponsor; and the Public Defender's Office is the kind of Office that requires mutual trust and confidence between the Public Defender and his Assistants. The facts in this case, as in *Ramey*, are completely dissimilar to *Elrod v. Burns* and call for a reversal.

To equate mere sponsorship with political coercion and to place attorneys in a category with non-policy-making, non-confidential employees will have the effect of eliminating constitutionally permissible forms of patronage and is, in our opinion, an unwarranted drastic extension of the *Elrod* ruling.

52 Id. at 761.

CONCLUSION

For the reasons stated, the judgments below should be reversed.

Marc L. Parris Esq.
County Attorney
Rockland County,
11 New Hempstead Rd.
New City, N.Y. 10956
(914) 425-5180

Charles Apotheker, Esq.
11 New Hempstead Rd.
New City, N.Y. 10956
Of Counsel